Statement of Congressman C.L. "Butch" Otter
Subcommittee on Water Resources and Environment
Committee on Transportation and Infrastructure
H.R. 1749, the "Pest Management and Fire Suppression Flexibility Act"
September 29, 2005

Thank you Mr. Chairman,

While I am no longer a member of the subcommittee, I appreciate you holding this hearing today and working with me on this important piece of legislation. I also want to welcome a fellow Idahoan: Scott Campbell, Chairman of the Water Quality Task Force of the National Water Resources Association, will be testifying today. I am proud to represent Scott here in Congress. I couldn't do my job half as well without the information and ideas I have received from Scott over the years. I hope you all will listen closely and take to heart what he has to say. I also am pleased to be sharing the table with Congressman Cardoza. I appreciate all his help in gaining support for the Pest Management and Fire Suppression Flexibility Act, which currently has 69 members signed on as cosponsors.

H.R. 1749 or the Pest Management and Fire Suppression Flexibility Act codifies the Environmental Protection Agency's rulemaking and longstanding policies regarding the Clean Water Act and pesticide applications, fire suppression and other pest management activities. In so doing, H.R. 1749 reaffirms Congressional intent and the long-held positions of Republican and Democrat administrations.

Congress passed the federal Clean Water Act in the early 1970s in an attempt to better account for and more closely regulate discharges of municipal wastes and pollutants into our nation's waterways from large industrial facilities. More than 30 years later, however, federal courts have expanded the scope of the Clean Water Act far beyond the original intent of Congress. Today, family farmers, mosquito-abatement and pest-control districts, irrigators, rural water districts, federal and state agencies, foresters, pest and lawn-care control operators and many others are subject to unnecessary, bureaucratic permitting requirements and nuisance lawsuits based on misguided interpretation of the Clean Water Act by the 9th U.S. Circuit Court of Appeals.

In the *Talent* decision, the court ruled that persons applying a pesticide according to the federally approved label directly to or above a body of water must first obtain a Clean Water Act permit. The court's viewpoint in *Talent* blatantly disregards the comprehensive pesticide registration process required by the primary federal pesticide statute, the Federal Insecticide, Fungicide and Rodenticide Act. Under FIFRA, the EPA reviews environmental affects and water quality data, and approves specific use directions for pesticides based on the information it has evaluated – a factor the district court in *Talent* relied upon heavily in rejecting the suit. Failing to use a pesticide in accordance with its EPA-approved labeling is a violation of federal and state laws.

It has been the operating approach of EPA that the application of agricultural and other pesticides in accordance with label directions is not subject to Clean Water Act permitting requirements. EPA has never stated in any general policy or guidance that a permit is required for such applications. EPA recently issued rulemaking specifically exempting pesticide applications performed according

to label instructions directly to, above or near bodies of water from Clean Water Act permitting requirements.

While rulemaking is helpful, I fear it will not stop the lawsuits. In my home district, the Gem County Mosquito Abatement District is being sued for not having a Clean Water Act permit before spraying. Yet the EPA refused to grant the county's application for just such a permit. The agency explained to the county that no permit is necessary, but the county now has to use its scarce resources to defend its position in court.

By transferring regulatory primacy over pesticide use from FIFRA to the Clean Water Act, the 9th Circuit has authorized attorneys for activist groups to bully and intimidate farmers, mosquito abatements districts and others into ceasing long and widely practiced activities that have been authorized by – and already are closely overseen by – federal and state governments.

An equally important but less frequently discussed part of the bill involves fire suppression. It aims to protect state and federal firefighters from nuisance litigation by reaffirming that the use of fire retardants by or in conjunction with federal and state firefighting agencies is not subject to NPDES permitting requirements. This provision was necessitated by the 9th Circuit's *Forsgren* decision. In that case, the court misinterpreted a long-standing EPA rule clearly stating that fire control activities do not require an NPDES permit.

My district is home to the National Interagency Fire Center, the country's support center for wildland firefighting. NIFC is comprised of seven federal and state agencies that work together to coordinate and support wildland firefighting and disaster operations. In developing H.R. 1749, I learned that activist groups had threatened to file a Clean Water Act lawsuit against the U.S. Forest Service for its use of fire retardants in Montana. Idaho, Montana and many other western states are very vulnerable to dangerous, destructive and potentially deadly wildfires, and I feel strongly that redundant red tape and mischievous litigation should not delay efforts to combats these outbreaks.

Moreover, the use of fire retardants already is heavily regulated. Before approving any fire retardant for use, the Forest Service conducts an intensive, two-year procedure that includes testing the product for aquatic toxicity. In addition, the Forest Service and Bureau of Land Management require a 300-foot buffer zone for use of fire retardants near aquatic environments.

The court's misinterpretations give license to activist groups to intimidate farmers, federal and state agencies and mosquito abatement districts into discontinuing well established, expressly approved and heavily regulated activities. H.R. 1749 provides needed protection against such costly and needless lawsuits.

Thank you again for conducting today's hearing, and I look forward to working with the committee to pass this bill into law.